

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

- against -

HARALD JOACHIM VON DER GOLTZ,

Defendant.

No. S6 18 Cr. 693 (RMB)

HARALD JOACHIM VON DER GOLTZ'S SENTENCING MEMORANDUM

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Defendant Harald Joachim von der Goltz respectfully submits this memorandum in advance of sentencing, currently scheduled for September 21, 2020.

PRELIMINARY STATEMENT

A sentence consisting of time served, one year of home confinement, and voluntary departure from the United States immediately upon completion of home confinement is sufficient, but not greater than necessary, to punish Harald Joachim von der Goltz for his offenses in this case.

Known variously by his friends and family throughout Europe, Latin America, and the United States as Johan, Jochen, Joaquin, Tica, and sometimes Gogo, Mr. von der Goltz is 83 years old and has a long history of cardiovascular and other health problems. He has survived multiple, against-the-odds open heart surgeries, including when he had a double heart attack just a few months before he was indicted in this case. Given his age and poor health, as well as the COVID-19 pandemic and its disproportionate impact on this country's prisons, sentencing Mr. von der Goltz to any term of imprisonment would put him at grave risk of death. This is particularly true given that Federal Bureau of Prisons regulations do not permit elderly, nonviolent, first-time offenders like Mr. von der Goltz to be designated to federal prison camps if they are not U.S. citizens. Instead, if sentenced to prison, Mr. von der Goltz will be designated to a low- or medium-security, private, for-profit prison. And if he survives until the end of his term, he would be transferred directly to an Immigration and Customs Enforcement facility where he would be detained for an indefinite period until he is deported. According to the *New York Times*, the five largest known clusters of COVID-19 are in correctional facilities. More than *half* of ICE detainees who received tests were positive for COVID-19. And of the prisoners in BOP custody who have died of COVID-19, 89% were age 50 or older. To be sure, Mr. von der Goltz committed serious offenses and deserves to be punished. But he does not deserve a

punishment that will put his life in danger. In light of the disturbing consequences that imprisonment would have in this case, as well as Mr. von der Goltz's long history of philanthropy, dedication to social and technological progress, and caring support for so many friends and family, a prison sentence of any length cannot be justified.

A sentence of time served and home confinement vindicates the goals of sentencing by providing just punishment for Mr. von der Goltz, protection of the public, rehabilitation, and deterrence. As the Supreme Court recognized in *Gall v. United States*, 552 U.S. 38, 48 (2007), home confinement is not leniency. It is a substantial restriction of a person's liberty, and for Mr. von der Goltz, it effectively would cut him off from friends and family who are unable to travel, impede his ability to contribute to the causes he is so passionate about, and force him to spend what may be a substantial portion of the remainder of his life reporting to, worrying about, and complying with orders from the Probation Office. Mr. von der Goltz poses no threat to the public and no risk of recidivism. He voluntarily agreed to come to the United States to face the charges instead of fighting extradition from the United Kingdom. And he has watched his long reputation as a person of integrity become forever tarnished as a result of media attention to this case and his admission to evading taxes, directing bank transfers in furtherance of that conduct, and lying to the government about his crimes. As the Honorable Kevin T. Duffy once said in sentencing a 69-year-old who evaded import taxes, and then was a fugitive for 23 years, to time served:

[T]he punishment lies not only in that but in the shame that [the defendant] brought to himself and more importantly to his family. [His family is] suffering now and will continue to suffer from this, and there is no one to blame except [the defendant]. So, for the rest of his life, he will have to face up to the fact that if he ever has grandchildren, they will be the ones who say oh, yes, my grandfather, the felon.

Transcript at 10–11, *United States v. Garbarino*, No. 87 Cr. 860 (KTD) (S.D.N.Y. Jan. 7, 2013)

(Exhibit 1).¹ There is no worse punishment for Mr. von der Goltz than knowing the shame and humiliation he has brought on his family and on himself.

Mr. von der Goltz's long history of good works, the consequences he already has suffered, and the danger to his health inherent in a prison sentence make clear that the just punishment in this case is time served, one year of home confinement, and voluntary departure from the United States immediately upon completion of the term of home confinement.

MR. VON DER GOLTZ'S BACKGROUND

A. Childhood And Education

Mr. von der Goltz was born outside Berlin, Germany in 1937 to Erika and Ruediger von der Goltz. Ruediger came from a long line of members of the Prussian military, and while Erika was born and raised in Guatemala, she had roots in Hamburg. In 1938, appalled by the increasingly bellicose and anti-Semitic conduct of the Nazi Party, Erika and Ruediger moved with their son—known to them as “Jochen,” a German nickname for Joachim—to Guatemala City, Guatemala. At that time, Guatemala City had very few paved roads, rudimentary infrastructure, and little economic development. Although Ruediger found success in coffee exports and other agribusiness ventures, the von der Goltz family lived a modest lifestyle. To make extra money, Ruediger collected stamps and sold them to collectors around the world. He would walk from bank to bank in Guatemala City collecting old envelopes, and, using water from the home bathtub, separate the stamps, dry them, and then sell them to a stamp distributor in the United States. Nevertheless, Mr. von der Goltz grew up in relative comfort compared to many Guatemalans—a circumstance he would never forget.

While comfortable in some respects, Mr. von der Goltz's early childhood was also

¹ Citations to exhibits refer to the exhibits to the accompanying Declaration of Daniel Koffmann, dated July 2, 2020.

marked by calamity and suffering. In 1942, when Mr. von der Goltz was four years old, government officials arrived at his front door to arrest his father and transport him to Idaho, and later to Montana, where he was interned in a camp with other Latin Americans of German descent. Mr. von der Goltz would not see his father again for more than four years. In 1943, authorities detained Mr. von der Goltz's great uncle Friedrich Nottebohm and similarly rendered him to an internment camp in the United States. Then, the Guatemalan and U.S. governments confiscated all of Friedrich's personal property and much of the assets of the company he had built with Mr. von der Goltz's grandfather after moving to Guatemala from Hamburg. (After his release from the U.S. internment camp, Friedrich challenged the expropriation, and the case resulted in the landmark decision from the International Court of Justice regarding the definition of citizenship. *See The Nottebohm Case (Liechtenstein v. Guatemala)*, 1955 I.C.J. 4 (1955).)

After his release from internment, Mr. von der Goltz's father returned to Guatemala and started his agribusiness and export ventures, which eventually became known as Compania Agro Comercial. With the success of Agro Comercial, Mr. von der Goltz's parents were able to send him to St. Paul's School in New Hampshire. Mr. von der Goltz's time at St. Paul's would be one of the seminal experiences of his life. In addition to building lifelong friendships and receiving outstanding educational preparation for the rigors of MIT, Mr. von der Goltz developed the sense of service and philanthropic engagement that would come to define his professional and personal life. James Gubelmann, a St. Paul's alumnus and business associate of Mr. von der Goltz, explains that "character building of honesty and integrity were essential to our educational molding." (Letter from J. Gubelmann (A036).)² And Jon Landry, Mr. von der Goltz's soon-to-

² For ease of reference, we have included the letters submitted in support of Mr. von der Goltz in a consecutively paginated appendix. English translations of letters written in a foreign language can be found immediately after the foreign-language version.

be son-in-law and fellow St. Paul's alumnus, recounts how at "Christmas and Thanksgiving Mr. von der Goltz will read from the Bible and the St. Paul's School prayer/motto – 'Grant O Lord that in all the joys of life we may never forget to be kind. Help us to be unselfish in friendship, thoughtful of those less happy than ourselves, and eager to bear the burdens of others.'" (Letter from J. Landry (A069).) This prayer has been Mr. von der Goltz's credo for nearly 70 years.

B. Early Business Ventures In Germany And Guatemala

After graduating from MIT, Mr. von der Goltz spent the next 20 years in a series of apprenticeships, jobs, consultancies, and entrepreneurial ventures in Germany and Guatemala. His first job out of college was as the personal assistant to the German industrialist Otto Wolf von Amerongen, followed by six years working in Guatemala at Agro Comercial, the company Mr. von der Goltz's father started. After another short stint working as a consultant to Otto Wolf in the early 1970s, Mr. von der Goltz started his first entrepreneurial venture, a brewery called Cervecería del Sur in Escuintla, Guatemala.

Starting Cervecería del Sur was another pivotal point in Mr. von der Goltz's life. For decades, a Guatemalan brewery functioned effectively as a monopoly, maintaining a stranglehold on the market. Mr. von der Goltz spotted what he believed was both a market inefficiency and an unfairness, and sought to challenge the status quo with a new brewery. (Letter from J. Torres (A153).) As Juan Mini explains, "Tika"—a childhood nickname that Mr. von der Goltz's Guatemalan friends and colleagues still know him by—"was not a regular Guatemalan businessman. He was always interested in businesses that would challenge the status quo, and especially ones that had a beneficial effect for the general population and the world. He was always concerned with helping the less well off as well as the dwindling nature in the world, through innovative services and technology. This would be a constant in my view, all of his business life." (Letter from J. Mini (A078).)

It wasn't easy. Guatemala was in the midst of a brutal civil war, and despite his decision not to oppose unionization by the brewery employees, Mr. von der Goltz received death and kidnapping threats from Communist guerillas who were waging civil war. (Letter from M. Montorzi (A080).) And when the brewery was ready to begin shipping beer to market, a competitor bribed Mr. von der Goltz's brew master to contaminate the beer. What should have been Cervecería del Sur's triumphant entrance to the market turned into an embarrassing catastrophe. (Letter from Andreas von der Goltz (A164).) Nevertheless, the brewery was successful for a number of years, until the same competitor bribed another employee to over-pasteurize the brew, resulting in several shipments of beer turning into sugar water shortly after reaching market. This ultimately proved too damaging for Cervecería del Sur to survive.

Julio Escobar Feltrin's construction company had assisted in building the brewery. During construction, Mr. von der Goltz had persuaded Mr. Escobar Feltrin to accept "a block of shares of the capital stock of the corporation as part of [his] fees." When the brewery "went bankrupt and declared itself insolvent[,] Tika came to my office holding a cheque in his hand and said to me: 'I am responsible for having convinced you to invest in our company. Therefore, I am giving you back the amount of your investment'. I refused to accept the cheque but, to the present day, remain profoundly grateful for his [beautiful] and unforgettable gesture." (Letter from J. Escobar Feltrin (A025).)

Mr. von der Goltz's time in Guatemala was tumultuous for other reasons too. In 1976, three days after he married his wife Belle, a 7.5 M_w earthquake devastated Guatemala, killing more than 20,000 people and leaving more than a million homeless. Long-time family friend Juan Gutierrez describes Mr. von der Goltz's response: "For many months afterwards, Tica's attention focused almost exclusively on helping the impacted communities recover from that

devastating disaster, and I personally watched and listened to stories about how he had helped people meet their needs and navigate their pain and anguish, especially families in his employ.” (Letter from J. Gutierrez (A038).) Belle recalls how “Jochen took part in airdropping vital food and supplies to remote regions of Guatemala cut off from the outside world and desperate for aid. This was the first time I saw how committed he was to helping those less fortunate than himself. I too spent several weeks assembling care packages in a makeshift facility for the earthquake victims.” (Letter from B. von der Goltz (A170).)

The violence of the civil war began to hit closer to home, as well. Mr. von der Goltz’s father Ruediger was kidnapped by the Fuerzas Armadas Rebeldes, the primary Communist guerilla organization in Guatemala, as were his cousin, sister-in-law, and a number of employees, friends, and acquaintances. And Mr. von der Goltz continually received threats of violence against himself and his family. (*See, e.g.*, Letter from Fuerzas Armadas Rebeldes (Apr. 18, 1972) (Exhibit 2).) Notwithstanding the danger he was in, Mr. von der Goltz “never expressed anger or desire for revenge of any sort.” Instead, he “became deeply interested in how to prevent this type of behavior in future societies. Joaquin consistently concluded that fostering self-respect, respect for nature, and respect for the living environment starting in childhood is a most powerful first step for improving the life of every single and all individuals.” Many of his projects in later years would be “aimed to this end.” (Letter from M. Montorzi (A080).)

Ultimately, however, Mr. von der Goltz made the difficult decision to leave Guatemala.

As his wife Belle explains:

In 1981 we moved to the US. The reason was the following: one day as I was driving up to our 4 yr old son’s nursery school, I came upon the wreckage of an SUV with shattered windows and two bodies lying in the street. Kidnappers had attacked the car of the head of Nestle and taken his young son, killing the bodyguard and chauffeur. I turned back and drove home and told my husband I

would not live in a country where such acts took place. Previously a child had been abducted from my 8 yr old stepson's class and finally ransomed but his ordeal left him traumatized for life and I didn't want to risk something happening to our family. I wanted to live in a country where I didn't need to fear for our safety on a daily basis. Jochen pulled up stakes and we left for the US, living first 3 years in NYC and then moving to Boston, the 'tech highway' of the Northeast. There Jochen founded Boston Capital Ventures and was involved in many new and innovative projects.

(Letter from B. von der Goltz (A170).)

C. Moving To America And Starting Boston Capital Ventures

With his experience starting and running new businesses, interest in promoting social progress, and commitment to those who trust him with their money, Mr. von der Goltz was a natural in the world of venture capital. As longtime friend Edward Barton Scott recalls, Boston Capital Ventures "helped finance over 150 start-up companies and created more than 50,000 new jobs in the United States." (Letter from E. Scott (A138).) One investment was in Exa Corporation, whose technology enabled the accurate computer modeling of aerodynamics, heat, and noise. Stephen Remondi, the founder of Exa, recalls the excitement and dedication that Mr. von der Goltz brought: he was "always in motion, always pushing and prodding and butting in," and with his "tenacious backing, we ultimately succeeded – creating over 400 jobs, and most importantly helping our industrial customers bring more efficient and less polluting products to market." (Letter from S. Remondi (A121).) BCV's investment in Exa was a winner financially, but Mr. von der Goltz's "satisfaction around Exa had far more to do with our impact on improving the world in which we live than BCV's financial return." (*Id.*)

Mr. von der Goltz brought the same earnestness to how he interacted with his own investors. David Kronfeld, an early BCV partner, describes how sometimes "circumstances gave rise to a gray area around whether we had earned an extra fee or should recoup expenses from investors above our fee. Johan consistently never allowed the firm to take advantage of a gray

area. He always maintained that if we err on how we charge fees, it should be to the advantage of the people who entrusted us with managing their money. . . . Johan was truly an exception - he set a high standard and maintained it.” (Letter from D. Kronfeld (A058).) Jack Shields, who ran BCV with Mr. von der Goltz for nearly 30 years, echoes that sentiment: “Johan always took a position that he felt was in the best interest of our investors even if it might detract from the fund’s performance metrics. . . . I am also aware of a non BCV investment which Johan had recommended and made with a friend that resulted in a total loss. In that situation Johan restored the friend’s investment amount. When I asked why Johan said because he felt guilty for making a bad recommendation to his friend.” (Letter from J. Shields (A140).) Mr. von der Goltz’s attention to investors extended even beyond financial returns. Rick Beinecke tells an anecdote about Mr. von der Goltz arranging a special event for him after a BCV annual meeting, concluding that it “was so characteristic of Johan to choose to do something very special for his investment partners.” (Letter from F. Beinecke (A002).)

Perhaps most impressive, however, is the manner in which Mr. von der Goltz conducted himself at the negotiating table and with other adversaries. Nicolas Kensington’s client Sharon Bolt and Screw found itself at BCV’s mercy when its “desperate financial situation” made it a “particularly vulnerable target for aggressive negotiations” and last-minute amendments to a proposed deal. But instead of exploiting Sharon’s weak position in order to renegotiate the deal to BCV’s benefit, Mr. von der Goltz “returned to his investor group and advised them: (i) that it was not ‘honorable’ to change the deal at this late time; and (ii) that the investor group should accept the minor structural changes” to the deal. As a result, Mr. Kensington explains, the “transaction was completed exactly as Jochen had proposed to his investor group; and it became a very successful investment for Boston Capital Ventures and for my clients, when it was sold in

approximately 4-5 years after it was acquired.” (Letter from N. Kensington (A054).) Don Steiner, who co-founded BCV with Mr. von der Goltz, recalls a similar story: “We had committed for a second round of funding [to a company called GEScan] but the market dynamics had changed and the company was not performing well. Our co-investor felt we should walk away from the investment and not make the second round investment. Johan believed that our word and reputation were more important and convinced our internal partners and our co-investor to make the second round investment.” (Letter from D. Steiner (A148).)

Taken together, Mr. von der Goltz’s financial success and commitment to doing business with integrity is uncommon. As former banker Alexander Jones, who has observed how Mr. von der Goltz has handled the contentious fallout of a failed deal, says, “I have met many men during my long career, but I can honestly say that Jochen von der Goltz is one of the very few men that I look up to, and one of the most admirable men that I know.” (Letter from A. Jones (A051).)

D. Social-Impact Investing And Support For Needy Causes

Mr. von der Goltz’s St. Paul’s classmate Asheton Toland describes how, while Mr. von der Goltz’s “stated goal” as a venture capitalist and investor was “making money,” that “was not what Yohan was all about. He cared more about personal relationships and certain causes like the environment. . . . I listened to his pitch many times over the years on some invention which would be good for the planet. His real enthusiasm was less about the big score and more about the universal good that could be achieved.” (Letter from A. Toland (A152).) Christopher Nagel, a physicist and inventor whose pursuits Mr. von der Goltz has supported for many years, has a similar view: “He is a vital supporter of my mission to develop technology that benefits the impoverished and protects the environment. . . . He has demonstrated, time and again, how firmly he holds to the belief that everyone should benefit from advancements in education and

technology, not just a few for profit's sake. . . . He is one of the most ethical and selfless advisors I have had.” (Letter from C. Nagel (A086).)

Although Mr. von der Goltz has made numerous social impact investments, none has been more important to him than Rain Forest Adventures. As explained in more detail below, Mr. von der Goltz has viewed this company since its inception not just as a way to make money, but as an example of how businesses can both make money and promote social causes. And Mr. von der Goltz's philanthropy extends well beyond social-impact investing. He has supported numerous charitable causes around the world, with particular emphasis on supporting eye care in Guatemala and providing grants, scholarships, and other funding for teachers and schools.

1. *Rain Forest Adventures*

As reflected in the letters submitted in support of Mr. von der Goltz, Rain Forest Adventures is near and dear to his heart. The company designs, builds, and operates aerial trams in rainforests throughout the Caribbean, with guided tours at the top of the rainforest canopy and other ecotourism excursions. For Mr. von der Goltz, the company is not just as a way to entertain vacationers, but a way to spread awareness and education about the importance of conservation and to provide local populations with tourism revenue as an alternative to logging and other harmful exploitation of the rainforest. As prominent investor and philanthropist Alejandro Santo Domingo explains, this idea was “not only novel but also avant-garde. [Johan] was able to further the economic development of Costa Rica and other parts of Central America and the Caribbean by promoting tourism in a socially responsible way, and by creating awareness about conservation and the Rainforest.” (Letter from A. Santo Domingo (A136).)

The company has been a labor of love, with more false starts, setbacks, and existential challenges than any purely profit-seeking investor would have endured. John Dalton, who later oversaw the construction of the first tram, explains how the company was in such disarray when

he first got involved that he had no interest “in cleaning up the mess.” He advised Mr. von der Goltz to cut his losses and move on. But the project was too important to Mr. von der Goltz:

I will never forget his passionate response, which included his adamant determination that the company succeeds in proving that conservation and tourism can work together (the word ecotourism was not yet coined at that time). . . . His commitment was so strong that he changed my mind right there over the phone. Even with my projections of another 5 months minimum and several hundreds of thousands of dollars to correct the problems and complete the project he did not flinch and was true to his word. That conversation changed the trajectory of my life even though I had yet to meet the man in person. . . . True to his word[,] Johan was always there when needed. He has been loyal to his dreams of making a difference and loyal to a fault to his employees.

(Letter from J. Dalton (A017).) Alexandra Mavros, who sat on Rain Forest’s board, describes how Mr. von der Goltz’s passion was “contagious; he cared for the workers on the ground, creating jobs and educating them on all things eco-tourism. . . . Jochen’s ideas infused with his passion for wildlife, the environment and the local people is remarkable. This initiative coupled with his business acumen was just a joy to be a part of.” (Letter from A. Mavros (A073).)

As a result of Mr. von der Goltz’s steadfast determination and boundless enthusiasm, Rain Forest Adventures got off the ground in Costa Rica and then expanded to Jamaica, St. Maarten, St. Lucia, and Panama. In the process, Rain Forest has brought nearly one million visitors closer to nature and has provided new educational and economic opportunities for local populations. Mr. von der Goltz has “paid for busloads of local school children, led by guides, to come and see the jungle from above. He viewed it as a wonderful learning experience that would hopefully get them interested in the environment and how to save it.” (Letter from A. Toland (A152).) And he has ensured that the hardworking guides, crew, and other staff receive fair and respectful treatment. As Mr. von der Goltz’s longtime friend Harald Lamotte observed during a visit, “I remember being impressed how much [local staff members] loved their job,

mentioning that Jochen von der Goltz was an excellent ‘Patrón’, concerned for their well-being and that of their families.” (Letter from H. Lamotte (A067).) Their devotion to the company is such that, as Rain Forest board member Charlie Bridge recalls, “after a particularly bad hurricane” hit St. Lucia, the “local community turned out on their own accord and cleaned up the access to the Tram before they cleaned up their own homes This only occurred because of the culture Johan instilled at” Rain Forest. (Letter from C. Bridge (A006).)

Sadly, like many businesses in the tourism industry, the company has been devastated by the COVID-19 pandemic. It has had to lay off hundreds of workers and maintain only a skeleton crew to protect the trams and other infrastructure. It remains to be seen whether the company can survive. Nevertheless, even if his investment in the company is now worthless, Mr. von der Goltz is committed to doing whatever he can under the circumstances to support Rain Forest Adventures’ mission to foster in others a sense of responsibility for preserving natural habitats.

2. *Fundacion de Ojos*

Another of Mr. von der Goltz’s great passions has been in providing free eye clinics and affordable ophthalmology for Guatemala’s indigenous populations, subsistence farmers, and others with limited means. Along with Dr. Bobby Quevedo, who was Mr. von der Goltz’s best friend growing up in Guatemala and then a classmate at St. Paul’s, Mr. von der Goltz has worked tirelessly to establish and finance eye clinics, hospitals, and research institutions over the past 50 years. Fellow St. Paul’s alumnus Henry Oxnard recounts how Mr. von der Goltz and Dr. Quevedo turned the “rat infested, dank, dark” basement of Roosevelt Hospital in Guatemala City into a small operating space for cataract surgeries. “Johan helped finance this and thought up the formula for financing low cost cataract surgery for the poor. They bought the lenses from China and employed ‘in training’ by Bobby Quevedo doctors for routine work and made a profit of \$150 per cataract operation on the well to do, all of which was used to finance the operations for

the poor.” (Letter from H. Oxnard (A088).)

Once things were running smoothly at Roosevelt Hospital, Mr. von der Goltz and Dr. Quevedo expanded the care to those living outside Guatemala City:

The first phase was Johan’s purchase of a large van which was equipped to do eye exams and minor eye care. Johan had a giant eye painted on each side of the van so that the peasants who could not read would know the purpose of the van. They became accustomed to seeing the “eye van” in their midst. This increased the demand for eye care substantially, with the result that Johan helped to finance the creation of several eye clinics throughout the highlands, complete with equipment and personnel. The “eye van” was then converted to taxi highland people to the clinics for treatment. The result of all their forty years of work (sadly, Dr. Quevedo passed away a few years ago) is that to this day thousands of indigenous people have had eye surgery at negligible cost due to the generosity of Johan [von] der Goltz.

(*Id.*)

Mr. von der Goltz’s financial support of both the Fundacion de Ojos de Guatemala (the Eye Foundation of Guatemala) and the Unidad Nacional de Oftalmología (National Ophthalmology Center) has been significant. As Dr. Carlos Portocarrero, who succeeded Dr. Quevedo, explains:

Joaquín and his mother, Ms. Erika, laid the foundations for the entire rural Ophthalmological program in Guatemala, which took several years (6 years) of work. They helped with the Ophthalmology training program, a library rich in books and journals. . . . They helped develop Ophthalmology at the National and rural levels, and expand the training of Ophthalmologists in the country and other Latin American countries, with enthusiasm, dedication, and financial considerations – without which this program would not have been possible.

(Letter from C. Portocarrero (A094).) In the last 10 years alone, approximately \$650,000 from the Revack Foundation—the vehicle through which Mr. von der Goltz failed to pay the taxes at issue in this case—has gone to support Dr. Portocarrero’s efforts, “and this money was used to equip three clinics with an operating room[, to fund] the salaries of 2 ophthalmologists for two

years,” and “to purchase tools for an ophthalmologic diagnostic center in Teculután and a retina operating room for [another] center in Huehuetenango.” (*Id.*)

The photographs below, reprinted with the permission of the Fundación de Ojos and the Unidad Nacional Oftalmología, illustrate the impact of Mr. von der Goltz’s years of support:

Huehuetenango Clinic



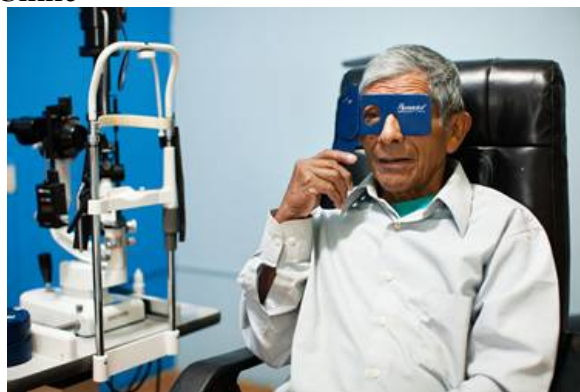
Sololá Clinic



Uspantan Clinic



Joyabaj Clinic



Mr. von der Goltz's support has gone beyond donations. As Dr. Portocarrero explains:

Not only did he help financially, but he planned and became personally involved in the construction programs, visiting the towns before and during the installation of the clinics. He always thought of the farmers and their families, how to care for them with the best medical care as if they were in the best hospitals in New York.

(Letter from C. Portocarrero (A094).) Fritz Garcia-Gallont, former Guatemalan Minister of Communications and Infrastructure and former Mayor of Guatemala City, echoes this sentiment: "Jochen was nonetheless always quite lovingly concerned for Guatemala. We saw each other regularly on his trips. He loves the country and its people. . . . For many years, the family has financially supported the most important non-profit eye foundation (Fundacion de Ojos de Guatemala), which today annually treats over 200,000 people from the poorer classes." (Letter from F. Garcia-Gallont (A028).)

3. *MIT's SEPT and NEST and Other Educational Programs*

Mr. von der Goltz also has been a constant supporter of educational causes. These include the Science and Engineering Program for Teachers (SEPT), the Network for Educators in Science and Technology (NEST), and scholarships, endowments, faculty awards, and other support at a number of schools. SEPT is a program that brings public school teachers to MIT for summer courses, and NEST is the SEPT alumni network that carries on the mission of raising the quality of math and science in public schools throughout the world. Dr. Ronald Latanision, who founded SEPT, describes Mr. von der Goltz's enthusiasm and financial support for the programs:

My recollection is that I met Johan at an MIT alumni function on campus. We spoke about my work with teachers and, sometime later, he offered to sustain SEPT. He made an annual contribution of \$70,000 throughout the 1990s. . . . To my great pleasure, he would also meet with the teachers on the MIT campus each summer and speak at our evening gatherings. His fiscal commitment was tangible and his emotional outreach to these people was very clear, warm and engaging.

(Letter from R. Latanision (A071).) Due, in part, to Mr. von der Goltz's contributions, "roughly 2000 teachers have shared part of their summer with us at MIT and some continue to communicate with the faculty during the course of each academic year. The students of these teachers are the ultimate beneficiaries of this interaction." (*Id.*)

Mr. von der Goltz also has made significant donations to schools including Needham Public Schools, St. Paul's School, the Fessenden School, and Milton Academy. At Fessenden, Mr. von der Goltz endowed a cash prize "where every year the students are given the choice to vote for their favorite teacher and subsequently the teacher is awarded with a financial award, in-turn hoping to promote the teachers to be the best that they can be in interacting with their students." (Letter from Andreas von der Goltz (A164).) And although Mr. von der Goltz sought to provide a similar award at St. Paul's, ultimately the idea was not quite as popular with the St.

Paul's faculty, and instead "with the help of the board he created several educational programs for teachers to travel and learn during their summers." (Letter from J. Landry (A069).)

E. First Priority: Family, Friends, And Those In Need

Ultimately, however, what gives Mr. von der Goltz the greatest pleasure is to spend time with family and friends, celebrating their successes, offering advice when he can, and consoling them in their times of need. The letters submitted in support of Mr. von der Goltz illustrate the impact he has had on the lives of so many:

- Alexandra Mavros: "But most importantly he was the very first person there, to phone or to fly in for support when my parents were in trouble, when my mother passed away or when my father had a very severe heart attack. He supported my parents and us children wherever he could, dedicated long hours over the phone or days to us when he came to visit, for condolence, sound advice or simply cheering up." (A073.)
- Harald Lamotte: "Jochen has always been interested in people, in seeking long-term friendships rather than short-term 'useful' relationships. He is an extremely loyal friend with a big heart. I remember telephoning him many years ago to say I had developed cancer and was looking for advice. He rang many of his friends, moved heaven and earth to find the best surgeon, the best hospital, the best post-operative treatment. I shall always be grateful to him for what he did for me at the time." (A067.)
- Michael Rothman: "In the early 1990's, my brother-in-law was diagnosed with a brain tumor located in the very middle of his skull. In passing, I mentioned my brother-in-law's condition and how devastated my sister and their five children were by the grim diagnosis. Johan started working behind the scene, using his contacts and knowledge running a venture firm with a focus on health care and technology. Johan called back 24 hours later. He had the name of a surgeon and an appointment and insisted that my brother-in-law fly to Boston for a second opinion. The prognosis presented by the Boston doctor was significantly better than my brother-in-law had received in Chicago. The surgery was scheduled immediately and my brother-in-law, after several months of recovery, had no significant issues - unless you count a bad haircut from the surgery. That was over 20 years ago and there has been no reoccurrence of any sort." (A130.)
- Stephanie Guttenberg: "My younger daughter is facing difficulties with her health since early childhood on and Jochen was one of the few who would regularly call just to ask how she was doing. Always looking for ways to help or to find options for her. I have to say that I have not had many people this genuinely interested and caring around me. Especially not from friends of my parents." (A039.)

- Peter and Connie Lacaillade: “It should also be noted that Johan is as loyal to his friends as he is to his family. When we were going through a rough patch in life with one of our sons, Johan was the first of our friends to reach out to help and to be supportive.” (A064.)
- Elizabeth Bryson: “Johan von der Goltz is an incredibly kind-hearted, loving, and thoughtful human being who is the foundation of his family. He has been nothing but compassionate, caring and giving to me, especially during difficult times when I was dealing with a lot of personal unrest.” (A007.)
- Heidi Eckes-Chantré: “He is one those friends that regularly checks in with you to see how you are doing. He is a natural connector and mentor, who is always doing his best to help others around him. . . . I only know Gogo”—another of Mr. von der Goltz’s nicknames, used primarily by German-speaking friends—“to be a kind, honest, big-hearted person, and forward-thinking person.” (A021.)
- Izabel Hoyos: “In the three years to follow, Gogo, living in Needham, MA, at that time, came to be my trusted ‘foster father’ . . . [and] trusted mentor, always being there when I needed him – from questions regarding academic life at a U.S. university, advice for my entrepreneurial career to follow, up to support with important family issues, such as finding the best possible American neurologist to treat my mother’s deteriorating Multiple Sclerosis.” (A049.)
- David Kronfeld: “Johan is a very generous, selfless and a kind person -- unusually so. Johan is the incarnation of the proverbial adage, ‘He’ll give you the shirt off his back when you need it.’ I witnessed his generosity and good heartedness many times over. I have seen him go out of his way to help other people with time, money and emotional support, again and again. Johan is truly a wonderful person whom one would be blessed to have as a friend.” (A058.)
- Andrei Karkar: “I am eternally grateful for his presence through my upbringing and instilling in myself a sense of what is important in life. His lessons have been key to successful business and enriching personal relationships. He was always there fully, and I am a better man for it.” (A053.)
- Thomas Kurrer: “On all these occasions, I could witness a truly human touch of Gogo: regardless of his or her background, Gogo treated everybody with respect, attentiveness, openness, honesty and a good sense of humour.” (A061.)
- Juan Mini: “Tika took me also as his son. He took me with him to work every day at 7am, and dropped me in the train station downtown. After work I would go to his office and stay with him until 11 pm most days. He was a hard worker! He taught me so many lessons about perseverance, hard work and the desire to make the world a better place, and to have an impact in the world through technology and innovation.” (A078.)
- Francesco Ruffo di Calabria: “There are various conversations I had with Jochen I

vividly remember to this day. Reflecting on them many years later, with a more mature judgment, make me appreciate his friendship all the more. Jochen took care of me, he welcomed me as a son into his house, and taught me the world of finance during numerous afternoons spent in his office at Old City Hall.” (A132.)

Two anecdotes in particular are characteristic of the way that Mr. von der Goltz rises to the occasion when a friend is in need. Robert Rattray, who guided Mr. von der Goltz and his guests during many hunting expeditions in Scotland, recalls meeting Mr. von der Goltz for breakfast one morning shortly after receiving news that his godson, Angus, had been in an accident while traveling in Guatemala. The accident had broken his leg, requiring immediate surgery. “On arrival at the hotel,” which was at approximately 1:30 a.m. Guatemala time, “I explained the situation to Jochen. I remember his response so well – ‘I need to make two phone calls to Guatemala now!’” The first call was to Mr. von der Goltz’s own surgeon in Guatemala City, to arrange for him to conduct the operation, and the second “was to a friend who owned a hotel, to take care of Angus once he had been discharged from hospital.” The operation was successful, and Mr. Rattray’s godson “made a complete recovery and today is able to enjoy a full and active sporting life. Without Jochen’s prompt and generous actions, Angus would have likely been afflicted with a disability for the rest of his life.” (Letter from R. Rattray (A119).)

Jeffrey Schulenburg’s parents were close friends of Mr. von der Goltz—so close that they asked him to be godfather to one of their daughters. Unfortunately, Mr. Schulenburg’s father contracted cancer when Mr. Schulenburg was just eight years old. When his mother realized that her husband was close to death, she asked Mr. von der Goltz to take her young son on a trip, perhaps believing it would be easier for him if he were not there when his father died:

The trip involved zig-zagging around Germany visiting some of Jochen’s family and relatives. I was not aware of the catalyst for the trip but one night, after a phone call with my mother when I now realize she told him that my father had passed away, Jochen held me tight all night in a way he had never done before. It must have been incredibly difficult for this young man to know how to

deal with a nine year old child. I will never forget that moment and only in later life did I understand the significance of the event.

Jochen has continued to play a role in my life, going out of his way to offer guidance and advice, always taking the time and making the effort to stay in touch. He is a truly decent, warm-hearted person who goes out of his way to help others.

(Letter from J. Schulenburg (A137).)

Despite Mr. von der Goltz's tireless efforts on behalf of investors, friends, and philanthropic pursuits, he always finds time for family too. His son Andreas recalls how even though "he came home late most evenings, and his dinner plate needed to be microwaved, he still took the time to read me a good night story and help me with my homework I love my father dearly, he is my father and also my best friend. He has a wonderful sense of humor and always taught me in life no matter what age you are, you have to never lose your humor and always act as though you are five years old." (Letter from Andreas von der Goltz (A164).) His daughter Annemarie, herself a St. Paul's alumna and successful financial advisor, describes how her father balanced tough love with emotional support and enabled her to develop independence, resilience, and self-sufficiency: "I owe everything I am today to him. . . . I know in my heart of hearts that my father has an incredible character and is incredibly big-hearted and generous." (Letter from Annemarie von der Goltz (A167).) Belle, his wife of 44 years, watched him raise their children with "stern determination," "always stressing the importance of honesty and self-sacrifice. He disdains any pretense of self-aggrandizement and feels drawn towards the honest workers he has met over the years through his efforts to create jobs in third world countries. . . . He desires to leave this world a better place than he found it and to continue to pursue projects which will benefit mankind." (Letter from B. von der Goltz (A170).)

F. Heart Problems And Other Health Issues

In 1984, at the age of 46, the layers of Mr. von der Goltz's aorta tore apart, causing an

aneurysm while he was in Guatemala visiting his parents and raising funds for BCV. His partner Don Steiner drove him to the hospital, where he stayed for more than a week until it was safe to fly to Boston for open heart surgery. He was lucky to survive—even today, almost 20% of people with this condition die before they reach the hospital. (Letter from M. Montorzi (A080).) This would be the beginning of a lifelong struggle with cardiovascular issues. The letters from Dr. Marcelo Montorzi and Dr. Laurance Sloss detail the myriad medical challenges Mr. von der Goltz has faced and continues to live with today. In addition to the end-to-end aortic dissection and aneurysm in 1984, he, among other things, underwent surgery in 1995 to repair and expand the valves in his aorta; experienced partial blindness in 2007 due to blood clots; and had a double heart attack in 2018, requiring three stents and a pacemaker to be implanted. He suffers from an irregular heartbeat, high blood pressure, poor kidney function, arthritis of the spine, a stomach hernia, an inflamed esophagus, asthma, and certain life-threatening allergies. (Letter from M. Montorzi (A080); Letter from L. Sloss (A143).)

APPLICABLE LAW

The Court’s task at sentencing is to impose a sentence that is “sufficient, but not greater than necessary,” to vindicate the “four identified purposes of sentencing: just punishment, deterrence, protection of the public, and rehabilitation.” *Dean v. United States*, 137 S. Ct. 1170, 1175 (2017).³ In doing so, the Court considers “the nature and circumstances of the offense and the history and characteristics of the defendant, as well as the need for the sentence imposed to serve the four overarching aims of sentencing.” *Id.* “The court must also consider the pertinent guidelines and policies adopted by the Sentencing Commission,” *id.*, but it should not “presume that a Guidelines sentence is reasonable,” *United States v. Cavera*, 550 F.3d 180, 189 (2d Cir.

³ Unless otherwise noted, internal citations, quotation marks, and alterations have been removed from citations in this brief.

2008) (en banc). The sentence imposed should seek to avoid unwarranted sentencing disparities among similarly situated defendants, but the “disparity referenced by 18 U.S.C. § 3553(a)(6) is national, not case- or district-specific.” *United States v. Defendant*, No. 15 Cr. 638 (RMB), 2018 WL 1737179, at *2 (S.D.N.Y. Mar. 22, 2018), *vacated and remanded on other grounds*, 935 F.3d 63 (2d Cir. 2019).

ARGUMENT

A sentence of home confinement is sufficient, but not greater than necessary, to punish Mr. von der Goltz for his offenses. He has agreed to forfeit nearly all of his liquid assets, as well as potentially millions of dollars of future investment returns. He has been maligned in the press and humiliated before his friends and family. His name and his legacy have been tarnished forever. Given his age and numerous serious health conditions, a sentence of imprisonment could be tantamount to a death sentence. And even beyond the risk of COVID-19, Mr. von der Goltz would be subjected to disproportionately harsh conditions simply because he is not a U.S. citizen—something multiple judges in this district have found justifies sentences that do not include imprisonment. In light of the punishment he already has endured, and the sentencing alternatives available to the Court, there is no justification for sending Mr. von der Goltz to prison. This is particularly true given his lifetime of philanthropy, dedication to making the world a better place, and constant attention to the needs of others. The letters submitted in support of Mr. von der Goltz make clear that the conduct that led to his guilty plea is inconsistent with his history and character. A sentence of time served, one year of home confinement, and voluntary departure from the United States immediately afterwards vindicates all four goals of sentencing.

I. A SENTENCE OF HOME CONFINEMENT IS SUFFICIENT TO PROVIDE JUST PUNISHMENT.

A. A Sentence That Includes A Term Of Imprisonment Would Be Unnecessarily Harsh In Light Of The COVID-19 Pandemic And Mr. von der Goltz's Poor Health.

Any term of incarceration would be unjustified in light of the danger it would pose to Mr. von der Goltz's health. As described above, Mr. von der Goltz suffers from a host of heart and other conditions that place him at extremely high risk. His physician Dr. Montorzi explains that, if Mr. von der Goltz were imprisoned, "his tenuous health condition will put him at high risk of both complications and fast deterioration driven by the undue stress and punishment. The stress and the confined conditions could cause his respiratory function to deteriorate fast, his blood pressure to become unstable and to cause expansion of his aortic aneurysm, and his renal function to decay." (Letter from M. Montorzi (A080).)

Courts routinely decline to impose custodial sentences on older and unwell first-time, nonviolent offenders like Mr. von der Goltz. For example, in *United States v. Tahir*, a tax fraud case, the Honorable Andrew L. Carter declined to impose an incarceratory sentence, notwithstanding that tax fraud "is a serious offense and there [was] a large amount of money involved" in the case. Transcript at 20, *United States v. Tahir*, No. 13 Cr. 118 (ALC) (S.D.N.Y. June 5, 2015) (Exhibit 3). Judge Carter found, among other things, that the defendant's "lack of criminal convictions," "the fact that he's 67 years old and has led an otherwise law-abiding life," and "his record of charitable works" made imprisonment "greater than necessary to meet the ends of sentencing." *Id.*; see also *United States v. Hakimian*, Nos. 18 Cr. 70, 71 (NGG) (E.D.N.Y. Sept. 24, 2019) (70-year-old and 64-year-old brothers sentenced to three years' probation after pleading guilty to failing to disclose offshore bank accounts holding more than \$40 million and then fraudulently repatriating funds from the accounts); *United States v. Stewart*,

No. 15 Cr. 287 (LTS) (S.D.N.Y. May 4, 2016) (61-year-old sentenced to four years' probation, including one year of home confinement, after pleading guilty to four-year insider trading conspiracy); *United States v. Earvin*, No. 15 Cr. 193 (PAE) (S.D.N.Y. Nov. 10, 2015) (67-year-old former president of law enforcement officers' union sentenced to three years' probation, with six months of home confinement, after pleading guilty to embezzling union funds); *United States v. Garbarino*, No. 87 Cr. 860 (KTD) (S.D.N.Y. Jan. 7, 2013) (69-year-old sentenced to time served where he evaded import taxes and then was a fugitive for 23 years) (Exhibit 1). The U.S. Sentencing Guidelines similarly recognize that "in the case of a seriously infirm defendant, home detention may be as efficient as, and less costly than, imprisonment." U.S.S.G. § 5H1.4.

The COVID-19 crisis should dispel any suggestion that a custodial sentence is justified in this case. Older adults are at significantly increased risk of death from COVID-19. *See, e.g., Basank v. Decker*, --- F. Supp. 3d ----, 2020 WL 1481503, at *3 (S.D.N.Y. Mar. 26, 2020) ("The Court takes judicial notice that, for people of advanced age, with underlying health problems, or both, COVID-19 causes severe medical conditions and has increased lethality."). The Centers for Disease Control and Prevention reports that eight out of 10 COVID-19-related deaths reported in the United States have been among adults aged 65 years and older. Centers for Disease Control and Prevention, *Coronavirus Disease 2019 (COVID-19): Older Adults*.⁴

Moreover, according to the CDC, people like Mr. von der Goltz who have chronic conditions, including heart disease, are at higher risk of severe illness from COVID-19. Graham Readfearn, *What Happens to People's Lungs When They Get Coronavirus?*, The Guardian (Apr. 1, 2020).⁵ More than three quarters of COVID-19 patients in the United States requiring

⁴ Available at <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/older-adults.html> (last visited July 2, 2020).

⁵ Available at <https://www.theguardian.com/world/2020/apr/01/what-happens-to-peoples-lungs-> (footnote continued)

admission to the intensive care unit had at least one underlying condition, and 29% of those patients had preexisting heart conditions. Allison Aubrey, *Who's Sickest from COVID-19? These Conditions Tied to Increased Risk*, NPR (Mar. 31, 2020).⁶ “When the coronavirus enters your body and gets down to your lungs, what it does is stop the lungs effectively passing oxygen through into the blood, and so the heart has to work harder to pump that blood” through the body, and if there is “an underlying heart condition, that will put excess strain on [the] heart and lead to further complications.” Emmanuel Ocbazghi, *How COVID-19 Affects People with Diabetes, Cancer, and Other Conditions*, Bus. Insider (Apr. 2, 2020).⁷

Indications from prisons are even bleaker. “The stark reality is that avoiding exposure to COVID-19 is impossible for most detainees and inmates.” *Geovani M.-O. v. Decker*, No. 20 Civ. 5053 (KM), 2020 WL 2511428, at *1 (D.N.J. May 15, 2020). At one prison in Ohio, for example, about 80% of the inmates tested positive for COVID-19. See Dara Lind, *The Prison Was Built to Hold 1,500 Inmates. It Had Over 2,000 Coronavirus Cases*, ProPublica (June 18, 2020).⁸ A video taken at FCI Elkton, a low-security BOP facility, shows how inmates with COVID-19 symptoms are confined in close quarters with healthy inmates, making it all but impossible to prevent transmission. See Keri Blakinger & Keegan Hamilton, *“I Begged Them To Let Me Die”: How Federal Prisons Became Coronavirus Death Traps*, The Marshall Project (June 18, 2020).⁹ A similar video suggests that inmates had to stage a hunger strike just to get

[when-they-get-coronavirus-acute-respiratory-covid-19.](#)

⁶ Available at <https://www.npr.org/sections/coronavirus-live-updates/2020/03/31/824846243/whos-sickest-from-covid-19-these-conditions-tied-to-increased-risk>.

⁷ Available at <https://www.businessinsider.com/how-covid-19-affects-conditions-diabetes-asthma-cancer-underlying-copd-2020-3>.

⁸ Available at <https://www.propublica.org/article/the-prison-was-built-to-hold-1500-inmates-it-had-over-2000-coronavirus-cases>.

⁹ Available at <https://www.themarshallproject.org/2020/06/18/i-begged-them-to-let-me-die-how-federal-prisons-became-coronavirus-death-traps>.

masks. *See id.* Nor has the risk of infection while incarcerated diminished since the outbreak began. As of just two weeks ago, “***the five largest known clusters of the virus in the United States are not at nursing homes or meatpacking plants, but inside correction institutions,***” and even that likely is “a significant undercount because testing has been extremely limited inside prisons and because some places that test do not release the results to the public.” Timothy Williams, Libby Seline, & Rebecca Griesbach, *Coronavirus Cases Rise Sharply in Prisons Even as They Plateau Nationwide*, N.Y. Times (June 16, 2020).¹⁰ Worst of all, according to the BOP, ***89% of the individuals in BOP custody who have died from COVID-19 were age 50 or older.*** *See* Fed. Bureau of Prisons, *COVID-19 Resource Page*,¹¹ *BOP News Stories*.¹²

If Mr. von der Goltz is sentenced to a term of imprisonment, the likelihood that he will contract COVID-19 will skyrocket, and if he is infected, he almost certainly will die.

Numerous judges in this district have recognized that the COVID-19 disaster warrants non-incarceratory sentencing alternatives for older and other at-risk individuals. Just last month, the Honorable William H. Pauley sentenced a 34-year-old insider trading defendant who, like Mr. von der Goltz, was at high risk if he contracted COVID-19, to home confinement. *See* Transcript at 42–43, *United States v. Cohen*, 19 Cr. 741 (WHP) (S.D.N.Y. June 9, 2020) (Exhibit 4). Judge Pauley rejected the government’s argument that the defendant should remain in home detention until it becomes safe for him to begin a sentence of imprisonment as “unfair and undermin[ing] the need for certainty of punishment,” because “[i]t’s impossible to predict when the COVID-19 pandemic will abate and when the Bureau of Prisons could safely designate [the defendant] to a facility.” *Id.* Instead, Judge Pauley sentenced the defendant to one year of home

¹⁰ Available at <https://www.nytimes.com/2020/06/16/us/coronavirus-inmates-prisons-jails.html>.

¹¹ Available at <https://www.bop.gov/coronavirus/> (91 total deaths as of July 2, 2020).

¹² Available at https://www.bop.gov/resources/news_stories.jsp (each “inmate death” alert notes the inmate’s age, with 81 of them listing ages 50 or older as of July 2, 2020).

confinement with community service. *Id.* Relatedly, many judges have granted compassionate release to inmates at high risk from COVID-19, recognizing that preexisting medical conditions, age, and other risk factors, combined with the prevalence of COVID-19 in prisons, constitute “extraordinary and compelling reasons” to grant compassionate release.¹³

Even if the Court were to impose a sentence of imprisonment on Mr. von der Goltz, existing BOP policy would favor his immediate release *back* to home confinement. On April 3, 2020, the Attorney General directed the BOP “to immediately review all inmates who have COVID-19 risk factors,” and “for all inmates whom [the BOP] deem[s] suitable candidates for home confinement,” the BOP should “immediately process them for transfer and then immediately transfer them” out of BOP custody “following a 14-day quarantine.” Memo. from Att’y Gen. to Dir. of Bureau of Prisons, *Increasing Use of Home Confinement at Institutions Most Affected by COVID-19* at 2 (Apr. 3, 2020) (Exhibit 5). An earlier memorandum listed factors to guide the BOP’s determination about transfer to home confinement, which included, among other things, an inmate’s age and vulnerability to COVID-19 and risk to the community if released. Memo. from Att’y Gen. to Dir. of Bureau of Prisons, *Prioritization of Home Confinement As Appropriate in Response to COVID-19* at 1–2 (Mar. 26, 2020) (Exhibit 6). There can be no real dispute that Mr. von der Goltz would qualify for transfer to home confinement if he were in BOP custody. Imposing a sentence of imprisonment, only for the BOP

¹³ See, e.g., *United States v. Torres*, No. 87 Cr. 593 (SHS) (S.D.N.Y. June 1, 2020); *United States v. Daugerdas*, No. 09 Cr. 581 (WHP) (S.D.N.Y. May 1, 2020); *United States v. Rojas*, No. 18 Cr. 627 (SHS) (S.D.N.Y. Apr. 30, 2020); *United States v. Musumeci*, No. 07 Cr. 402 (RMB) (S.D.N.Y. Apr. 28, 2020); *United States v. Park*, 16 Cr. 473 (RA) (S.D.N.Y. Apr. 24, 2020); *United States v. Scparta*, No. 18 Cr. 578 (AJN), 2020 WL 1910481, at *9 (S.D.N.Y. Apr. 20, 2020); *United States v. Kataev*, No. 16 Cr. 763 (LGS) (S.D.N.Y. Apr. 14, 2020); *United States v. Smith*, No. 12 Cr. 133 (JFK), 2020 WL 1849748, at *1 (S.D.N.Y. Apr. 13, 2020); *United States v. Resnick*, No. 14 Cr. 810 (CM) (S.D.N.Y. Apr. 2, 2020); *United States v. Perez*, No. 17 Cr. 513 (AT) (S.D.N.Y. Apr. 1, 2020).

to put him in a 14-day quarantine and then transfer him back home, makes little sense.

Mr. von der Goltz is the prototypical defendant for whom a sentence of imprisonment, however brief, would so endanger his health as to be unjustified.

B. A Sentence That Includes A Term Of Imprisonment Would Be Unnecessarily Harsh Given Mr. von der Goltz's Immigration Status.

A term of imprisonment is also unnecessarily harsh because, as a non-citizen, Mr. von der Goltz would be designated to at least a low-security facility (as opposed to a minimum-security facility or federal prison camp) and, after serving his sentence, he would spend an indeterminate period in an immigration facility awaiting removal from the United States. Recent reports from Inspectors General of both the Department of Justice and the Department of Homeland Security have identified dangerously substandard conditions and inadequate medical care at each of these types of facilities, and the Court should have real concern that Mr. von der Goltz would not receive proper medical care for his significant health problems during any such confinement.

1. *If Sentenced to a Term of Imprisonment, Mr. von der Goltz's Conditions of Confinement will be Significantly Harsher due to his Immigration Status.*

If sentenced to a term of imprisonment, Mr. von der Goltz would be designated to a higher security facility than if he were a U.S. citizen, simply because he is not a U.S. citizen. Under BOP policy, first-time, nonviolent offenders like Mr. von der Goltz receive “minimum” security status and qualify for placement in federal prison camps. Bureau of Prisons Program Statement P5100.08 at ch.1, p.2 & ch.5, p. 12 Table 5–2 (Sept. 12, 2006) (Exhibit 7). This does not apply, however, to inmates who are not U.S. citizens. A non-citizen is designated as a “Deportable Alien” and required to be “housed in at least a Low security level institution.” *Id.* at ch. 5, p. 9. Mr. von der Goltz's immigration status thus renders him ineligible to serve his time

in a federal prison camp. Instead, he would be designated to, at best, a low-security institution like FCI Elkton, the prison discussed above at 26.

Mr. von der Goltz similarly would not be eligible to serve any portion of a sentence of imprisonment in a halfway house. Although 18 U.S.C. § 3624(c)(1) requires the BOP to ensure, “to the extent practicable,” that an individual serving a term of imprisonment spend a portion of the final months of that term in a halfway house or other conditions more conducive to preparing for reentry into the community, the BOP has concluded that it is impracticable for non-citizen inmates to serve their sentences in a federal halfway house. Bureau of Prisons Change Notice 7310.4 at p. 10, 10.b. (Dec. 16, 1998) (Exhibit 8) (inmates with “Deportable Alien” status ineligible for placement in a halfway house); *see also id.* at p. 11, 10.f & 10.j (deeming detainee inmates ineligible for halfway house placement).

Even worse, Mr. von der Goltz would be designated to serve any incarceratory sentence in a privately run, for-profit prison facility—again only because he is not a U.S. citizen. In January 2018, the Trump Administration required the BOP to re-designate all low-security male, non-U.S. citizen inmates with 90 months or less remaining in their sentence for transfer to a for-profit prison. Memo. from F. Lara, *Increasing Population Levels in Private Contract Facilities* (Jan. 24, 2018) (Exhibit 9). According to the Inspector General of the Justice Department, these institutions are more abusive, more violent, and more dangerous than those run by the BOP. These for-profit prisons “incurred more safety and security incidents per capita than comparable BOP institutions.” Office of the Inspector General, U.S. Dep’t of Justice, *Review of the Federal Bureau of Prisons’ Monitoring of Contract Prisons* at ii (Aug. 2016) (Exhibit 10).

Equally significant for Mr. von der Goltz, these private facilities have a history of failing to provide adequate medical care to inmates. The OIG reported that these facilities were

medically understaffed and “raised concerns that medical understaffing on the part of the contractor was financially incentivized because it cost the contractor less to pay penalty deductions for understaffing than to staff the prison adequately.” *Id.* at 33 n.62. And even facilities that comply with BOP guidelines are understaffed. The OIG observed while touring a compliant for-profit prison that “there was no full-time physician, as required by its approved staffing plan,” for a period of *eight months*. *Id.* at 33. Another review conducted by the BOP at this same facility “resulted in a significant adverse finding in health services.” *Id.* Given Mr. von der Goltz’s precarious health condition, access to adequate medical care could mean the difference between life and death.

In *United States v. Black*, the Honorable Colleen McMahon observed the cruel outcome that these BOP regulations have on foreign first-time, nonviolent offenders. No. 16 Cr. 640 (CM). In that case, Chief Judge McMahon sentenced a former Deutsche Bank investment professional convicted of manipulating LIBOR to a sentence of home confinement to be served in the United Kingdom, where his wife and children lived. At sentencing, she explained:

If I could sentence Mr. Black to a term of incarceration -- a brief term of incarceration -- knowing that he would go to a facility appropriate to his criminal conduct, I would do it. But I know that I can’t. I know that simply because he is a noncitizen -- and I use that term advisedly. He is not an illegal alien. But ***because he is a non-citizen, he will not be eligible to serve his sentence in the same way that any American citizen who stood convicted of this crime would serve. And that’s not right.***

Transcript at 91, *United States v. Black*, No. 16 Cr. 370 (CM) (S.D.N.Y. Nov. 4, 2019) (Exhibit 11) (emphasis added).

Mr. von der Goltz’s conditions of confinement during any term of imprisonment would be significantly harsher than U.S.-citizen inmates, and there are serious concerns that he would not receive proper medical care. These factors provide further support for the conclusion that

imprisonment would be an unnecessarily harsh punishment.

2. *Any Term of Imprisonment Would Be Followed by Post-Sentence Detention in an Immigration Facility Raising Additional Health Concerns.*

Mr. von der Goltz's status as a non-citizen would have an additional cruel impact on him if he were sentenced to a term of imprisonment. Under 8 U.S.C. § 1226(c)(1)(A), post-sentence immigration detention is *required* for any non-citizen convicted of an offense covered in 8 U.S.C. § 1182(a)(2), which includes fraud offenses, upon release from BOP custody. Even though Mr. von der Goltz would not challenge removal, that would not necessarily expedite the process. In 2018—the most recent year for which statistics are publicly available—the average length of stay of a non-citizen detainee awaiting removal was approximately 47 days. Immigration and Customs Enforcement, Budget Overview Fiscal Year 2020, at 4 (Exhibit 12).

“In determining what sentence is ‘sufficient, but not greater than necessary,’ to serve the needs of justice, a district court may take into account the uncertainties presented by the prospect of removal proceedings.” *United States v. Thavaraja*, 740 F.3d 253, 262–63 (2d Cir. 2014). And the conditions in ICE detention facilities are deplorable. The Department of Homeland Security Office of Inspector General recently “observed immediate risks or egregious violations of detention standards” at certain facilities, including “nooses in detainee cells, overly restrictive segregation, inadequate medical care, unreported security incidents, and significant food safety issues.” Office of Inspector General, Dep’t of Homeland Sec., *Concerns about ICE Detainee Treatment and Care at Four Detention Facilities* at “Highlights” (June 3, 2019) (Exhibit 13).

The DHS OIG summarized its findings as follows:

This report summarizes findings on our latest round of unannounced inspections at four detention facilities housing ICE detainees. . . . All four facilities had issues with expired food, which puts detainees at risk for food-borne illnesses. At three facilities, we found that segregation practices violated standards

and infringed on detainee rights. Two facilities failed to provide recreation outside detainee housing units. Bathrooms in two facilities' detainee housing units were dilapidated and moldy. At one facility, detainees do not receive appropriate clothing and hygiene items to ensure they could properly care for themselves. Lastly, one facility allowed only non-contact visits, despite being able to accommodate in-person visitation. Our observations confirmed concerns identified in detainee grievances, which indicated unsafe and unhealthy conditions to varying degrees at all of the facilities we visited.

Id. at 3.

Conditions appear only to have gotten worse since the COVID-19 pandemic began. As of the end of May, ***more than half of ICE detainees who received tests were positive for COVID-19.*** Seth Freed Wessler, *Fear, Illness and Death in ICE Detention: How a Protest Grew on the Inside*, N.Y. Times (June 4, 2020).¹⁴ Separately, “two medical experts for the Department of Homeland Security, have warned of a tinderbox scenario as COVID-19 spreads to immigration detention centers and the resulting imminent risk to the health and safety of immigrant detainees and the public.” *Basank*, 2020 WL 1481503, at *3; *see also Castillo v. Barr*, --- F. Supp. 3d ---, 2020 WL 1502864, at *2 (C.D. Cal. Mar. 27, 2020) (“Because of the highly contagious nature of the coronavirus and the, relatively high, mortality rate of COVID-19, the disease can spread uncontrollably with devastating results in a crowded, closed facility, such as an immigration detention center.”).

In *Black*, Chief Judge McMahon also cited to the immigration consequences of a term of imprisonment in sentencing the defendant to home confinement:

And for reasons that are incomprehensible to me, were I to sentence him to a short term of imprisonment . . . at the end of that term he could not walk out the door and be picked up by [his counsel] Mr. Levine and taken to the airport. He would be treated like an illegal alien, and he would be released into the custody of

¹⁴ Available at <https://www.nytimes.com/2020/06/04/magazine/covid-ice.html>.

ICE, and at some point long after my intended sentence had expired he would be deported. And that's not right.

Black Transcript at 91 (Exhibit 11); *see also Cohen* Transcript at 42 (Exhibit 4) (The Court: “In dealing with defendants who are foreign nationals like Mr. Cohen other judges have given consideration to the consequences attached to that status by the Bureau of Prisons. Foreign nationals, unlike similarly situated U.S. citizens, are unable to serve terms of imprisonment in a camp or minimum security facility. And when foreign nationals complete a term of imprisonment they are transferred to ICE detention where they can wait for an indefinite period to be returned to their home country.”).

In view of the unique circumstances of this case, the fact that any term of imprisonment would be extended by detention of uncertain duration in an appalling ICE detention facility further supports the conclusion that imprisonment is an unnecessarily harsh punishment for Mr. von der Goltz.

C. Given His Lifetime Of Good Acts And The Punishment He Already Has Received, Home Confinement Is Appropriate Punishment For Mr. von der Goltz's Crimes.

The more than 70 letters submitted in support of Mr. von der Goltz paint a picture of a person deeply devoted to people. His efforts to provide quality eye care to neglected communities in Guatemala, his support of unionization in the brewery he started, his constant attention to investors in BCV and fulfilling his duty to them, his endowment of scholarships and other support for education, and the many, many small acts of kindness and caring affection he showed for friends, employees, and family all speak to Mr. von der Goltz's commitment to his fellow man. Even his work in the rainforest ultimately is about helping people. Mr. von der Goltz believes deeply that climate change and the destruction of natural habitats contribute to disease, famine, economic inequality, and a lack of respect for human life, and that by arresting

the process of environmental damage, we can ameliorate these harmful impacts on society. More than anything else, Mr. von der Goltz has made his life about finding solutions to the problems that prevent people from achieving their full potential.

None of this excuses the conduct that led to Mr. von der Goltz's guilty plea. Tax evasion, wire transfers in furtherance of that tax evasion, and making false statements to the government are serious offenses, and Mr. von der Goltz fully accepts that he broke the law and should face consequences for having done so. But the letters make clear that this conduct, although it lasted over a period of years, is inconsistent with the way in which Mr. von der Goltz has lived every other aspect of his life. If Mr. von der Goltz's true character were to connive and cheat others in order to benefit himself, he never would have given away so much of his time and money to causes like the rainforest, eye care, and idealistic scientists with ideas for saving the world. Indeed, more than \$650,000 donated to the Fundacion de Ojos over the last 10 years came from the Revack Foundation, the vehicle used to commit the offenses in this case. (Letter from C. Portocarrero (A094).) As Michael Rothman, a BCV and Rain Forest Adventures investor, notes, "Johan not only invested but has dedicated a substantial amount of his time to making these educational projects viable. This has not been an efficient use of Johan's time or capital as measured by return, but it is a small invaluable step towards a more sustainable world." (Letter from M. Rothman (A130).) Mr. von der Goltz's contribution of Revack funds along with his time and energy to projects designed to do good is an important mitigating factor.

At 83 years old with serious cardiovascular and other health problems, a sentence of home confinement is sufficient to punish Mr. von der Goltz for his misdeeds. As the Supreme Court has recognized, home confinement "substantially restricts [a person's] liberty" and is not leniency. *Gall v. United States*, 552 U.S. 38, 48 (2007). Prior to Mr. von der Goltz's arrest in

December 2018, he was still actively traveling, meeting with business partners on the handful of projects in which he was still active, visiting Rain Forest Adventures sites, and generally refusing to retire. As Christian Furstenberg recalls, “When I last saw him about 2 years ago, I asked him if he was ever thinking about retiring and relaxing a little. This felt almost like an insult to him. He told me that if he ever stopped working, it was the end of him and he would go straight to the box.” (Letter from C. Furstenberg (A026).) From the day he was released from English jail, Mr. von der Goltz has been under strict conditions. Even though he voluntarily returned to the United States and did not fight extradition, his bail conditions have included 24-hour GPS monitoring, curfew, restricted travel, surrender of all passports, and other measures that have made it impractical for him to be actively engaged in the various projects in which he was involved prior to his arrest. Being on the sidelines for a year and a half has been devastating for Mr. von der Goltz as he feels helpless to assist his friends and partners navigate the challenging times in which the world finds itself. For an extrovert like Mr. von der Goltz, who is constantly in motion, seeking new challenges and new problems to solve, another significant period of isolation, cut off from family and friends who cannot travel, and unable to engage fully with the causes that mean so much to him, would be significant additional punishment.

This is all the more true given the publicity in this case, the false narrative that has attached to Mr. von der Goltz, and the taint that forever will be associated with him. The International Consortium of Investigative Journalists’ Panama Papers investigation is unique in its international scope, coordination, and reach. *See, e.g.,* Luke Harding, *What are the Panama Papers? A guide to history’s biggest data leak*, The Guardian (Apr. 5, 2016).¹⁵ In addition to hundreds of newspaper articles, there have been books, television exposés, and even a major film

¹⁵ Available at <https://www.theguardian.com/news/2016/apr/03/what-you-need-to-know-about-the-panama-papers>.

starring Meryl Streep focused on Mossack Fonseca and its clients. These media pieces have linked Mossack Fonseca and its clients to kleptocracy, corruption, terrorist financing, and a host of unseemly financial crimes. *See, e.g.,* Jodi Vittori, *How Anonymous Shell Companies Finance Insurgents, Criminals, and Dictators*, Council on Foreign Relations (Sept. 7, 2017) (“The Panama Papers leak of eleven million documents in April 2016 revealed that . . . longtime friends of Russian President Vladimir Putin, drug kingpins, and even a soccer megastar had something in common: they all channeled money through anonymous shell companies. . . . [Such] anonymous companies represent an important nexus of corruption, money laundering, transnational organized crime, and terrorism, which directly harm U.S. interests.”).¹⁶

This conduct has nothing to do with Mr. von der Goltz, but because this case is the only public U.S. prosecution arising out of the Panama Papers, he has been made the posterchild for it. Upon Mr. von der Goltz’s arrest, the government issued a triumphant press release, making more than a dozen references to Mossack Fonseca and congratulating itself for “follow[ing the] trail,” “following the money around the globe,” and “apprehend[ing] these criminal[s].” Press Release, U.S. Dep’t of Justice, *Four Defendants Charged In Panama Papers Investigation* (Dec. 4, 2018).¹⁷ It issued another press release when Mr. von der Goltz pleaded guilty and accepted responsibility for his conduct. Press Release, U.S. Dep’t of Justice, *Manhattan U.S. Attorney Announces Guilty Plea Of U.S. Taxpayer In Panama Papers Investigation* (Feb. 18, 2020).¹⁸ As a result, the von der Goltz name is forever tarnished, and not just because of Mr. von der Goltz’s offenses, but because of the way in which he has been linked to alleged misconduct about which

¹⁶ Available at <https://www.cfr.org/report/how-anonymous-shell-companies-finance-insurgents-criminals-and-dictators>.

¹⁷ Available at <https://www.justice.gov/usao-sdny/pr/four-defendants-charged-panama-papers-investigation>.

¹⁸ Available at <https://www.justice.gov/usao-sdny/pr/manhattan-us-attorney-announces-guilty-plea-us-taxpayer-panama-papers-investigation>.

he knew nothing and played no role in facilitating. For someone nearing the end of a life marked by uncommon efforts to help others and to do good, it is devastating for Mr. von der Goltz to see his legacy forever tainted, to reckon with “the shame” he has “brought to himself and more importantly to his family,” and to know that his grandchildren will have to “say, oh, yes, my grandfather, the felon.” *Garbarino* Transcript at 11 (Exhibit 1).

* * *

A term of imprisonment cannot be justified in this case. Mr. von der Goltz’s lifetime of good works, the punishment already visited upon him, the additional punishment inherent in home confinement, and the uniquely dangerous—and disproportionately harsh—conditions to which he would be exposed if sentenced to a term of imprisonment demonstrate that home confinement is sufficient, but not greater than necessary, to provide just punishment in this case.

II. A SENTENCE OF HOME CONFINEMENT IS SUFFICIENT TO PROTECT THE PUBLIC, PROVIDE REHABILITATION, AND DETER FUTURE MISCONDUCT.

Mr. von der Goltz poses no threat to the public. His crimes involved failing to pay taxes owed to the U.S. government, transferring funds in furtherance of that tax evasion, and making false statements to the government. These are serious offenses, but, as reflected in the letters submitted in support of Mr. von der Goltz, they are also inconsistent with his history and characteristics as an investor, entrepreneur, and friend. Although the conduct in this case lasted over a number of years, it was, by all accounts, an aberration. There is no real risk that Mr. von der Goltz could expose members of the public, the IRS, or anyone else to future harm, financial or otherwise.

Nor is there any need for rehabilitation, education, or job training. At 83 and in declining health, Mr. von der Goltz would not benefit from programs offered in correctional facilities. If anything, he would be a burden on any facility to which he would be designated, requiring

additional resources and attention due to his frail condition.

Finally, a sentence of home confinement serves the goal of deterrence. Here, there is no need for specific deterrence of Mr. von der Goltz. Because he is not a U.S. citizen and no longer is a permanent resident, he is not a U.S. taxpayer. As a result, he has no ability to evade taxes owed to the U.S. government. Nor would there be any risk even if he could. This painful episode has sullied Mr. von der Goltz's reputation and left his good name in tatters, created schisms in his family that may never be repaired, and left him largely financially dependent on his wife. The notion that Mr. von der Goltz will return to crime unless he is sentenced to imprisonment is farfetched.

Home confinement equally serves the goal of general deterrence. This case is a powerful reminder to anyone considering tax evasion that, even at 81 years old and a few months after a double heart attack and open heart surgery, the U.S. government will not hesitate to bring a nine-count indictment that carries a potential sentence of 75 years in prison, and in the process leave an otherwise good person's reputation, pocketbook, and personal life in shambles. If these consequences are not sufficient to deter someone considering evading taxes, there is little reason to think that the prospect of a term of imprisonment would be sufficient either.

III. A SENTENCE OF HOME CONFINEMENT WILL MINIMIZE UNWARRANTED SENTENCING DISPARITIES.

A sentence of home confinement for Mr. von der Goltz is consistent with the punishment that similarly situated defendants are facing. As noted above, numerous judges in this district have recognized that the COVID-19 pandemic warrants alternatives to incarceration for older and other at-risk individuals. Last month in *United States v. Cohen*, Judge Pauley sentenced a 34-year-old insider trading defendant with preexisting conditions that, like Mr. von der Goltz, put him at high risk for COVID-19 to home confinement. *Cohen* Transcript at 44 (Exhibit 4).

The government had sought 37 months. *Id.* at 38. Similarly, many judges have granted compassionate release to inmates on the ground that their high-risk profile and the increased risk of contracting COVID-19 while incarcerated create “extraordinary and compelling reasons” to permit those individuals to leave prison early. *See supra* at 28 & n.13. And still other inmates—including those who have been denied compassionate release—have been transferred to home confinement under BOP policy. *Supra* at 28. For example, Michael Cohen, who was sentenced to three years’ imprisonment for tax offenses, was transferred to home confinement even after Judge Pauley denied his motion for compassionate release. *See* Benjamin Weiser, Katie Benner, & William K. Rashbaum, *Michael Cohen, Ex-Trump Lawyer, Leaves Prison Early Because of Virus*, N.Y. Times (May 20, 2020);¹⁹ *see also* Sadie Gurman, *Ex-Trump Campaign Chairman Paul Manafort Released From Prison to Home Confinement*, Wall St. J. (May 13, 2020).²⁰

Even aside from COVID-19, other elderly defendants convicted of tax-related offenses routinely receive non-custodial sentences. According to the U.S. Sentencing Commission, between 2015 and 2019, 40% of defendants over the age of 60 in criminal history category I who were convicted of tax offenses received sentences that did not include imprisonment. (Exhibit 14 (data from the Sentencing Commission’s Interactive Data Analyzer, <https://ida.ussc.gov>).)

Moreover, as the Court of Appeals for the Seventh Circuit has noted, “probation is a common sentence in offshore tax evasion cases,” regardless of the defendant’s age. *United States v. Warner*, 792 F.3d 847, 862 (7th Cir. 2015). For example, in *United States v. Olenicoff*, the defendant was sentenced to two years of probation after pleading guilty to failing to report offshore bank accounts for at least 13 years and incurring a tax liability of \$52 million. No.

¹⁹ Available at <https://www.nytimes.com/2020/05/20/nyregion/michael-cohen-coronavirus-prison-release.html>.

²⁰ Available at <https://www.wsj.com/articles/ex-trump-campaign-chairman-paul-manafort-released-to-home-confinement-11589375414>.

07 Cr. 227 (CJC) (C.D. Cal. Apr. 14, 2008). In *United States v. Wajsfelner*, the Honorable Naomi Reice Buchwald imposed a sentence of six months' probation on a defendant who failed to disclose offshore accounts for 17 years, caused a tax loss to the government of \$419,940, and made false statements when interviewed by investigators. No. 12 Cr. 641 (NRB) (S.D.N.Y. Mar. 21, 2013). Similar decisions abound.²¹

Nor should the Court feel compelled to impose a sentence of imprisonment on Mr. von der Goltz simply because the government chose, shortly before trial, to add a charge against codefendant Richard Gaffey that carries a two-year mandatory minimum. As this Court has noted, the relevant benchmark for assessing whether a sentence creates unwarranted disparities under Section 3553(a)(6) "is national, not case- or district-specific." *United States v. Defendant*, No. 15 Cr. 638 (RMB), 2018 WL 1737179, at *2 (S.D.N.Y. Mar. 22, 2018), *vacated and remanded on other grounds*, 935 F.3d 63 (2d Cir. 2019). And even if the Court felt it necessary to sentence Mr. von der Goltz to prison because the government chose to deprive the Court of its full sentencing discretion with respect to Mr. Gaffey, doing so would create its own unwarranted disparity. Whereas Mr. Gaffey, as a U.S. citizen, would be eligible for designation to a federal prison camp, minimum security facility, or even a halfway house, as described above at 29–34,

²¹ See, e.g., *Tahir*, No. 13 Cr. 118 (ALC) (S.D.N.Y. June 5, 2015) (defendant sentenced to five years' probation where he omitted from tax returns more than \$5.3 million in gross receipts); *United States v. LiPuma*, No. 17 Cr. 410 (M.D. Pa. Jan. 9, 2020) (defendant sentenced to three years' probation, including nine months of electronic monitoring, after pleading guilty to misappropriating tax refunds totaling nearly \$4 million); *United States v. Ahuja*, No. 11 Cr. 135 (E.D. Wis. Feb. 1, 2013) (defendant sentenced to three years' probation, with six months' home confinement, where he was convicted by a jury of filing a false tax return and evading \$967,944.66); *United States v. Panousos*, No. 17 Cr. 10227 (D. Mass. Aug. 15, 2018) (three defendants received non-custodial sentences where they pleaded guilty to \$2.8 million cash-skimming tax fraud scheme that was motivated by "greed and a desire to cheat the government of the taxes they owed"); *United States v. Ward*, No. 15 Cr. 477 (N.D. Ill. Dec. 10, 2015) (defendant received two years' probation where he was convicted of falsifying business records to conceal receipts of cash, thereby underpaying taxes by more than \$600,000).

Mr. von der Goltz would be required to serve his sentence in a more restrictive facility with inadequate medical care, followed by an indefinite stay in an ICE detention facility.

IV. IN LIGHT OF THE SUBSTANTIAL FORFEITURE, AN ADDITIONAL FINE IS UNNECESSARY.

The forfeiture order that this Court entered leaves Mr. von der Goltz with essentially no liquid assets. Pursuant to the order, Mr. von der Goltz has paid \$105,893, shortly will be paying another \$440,000, and has forfeited his interests in (1) several bank accounts that collectively held \$2,290,761; (2) all future investment returns that any of the Revack entities will earn from five separate venture capital and private equity funds; and (3) his one-third ownership of an apartment in Munich, Germany worth approximately \$900,000 in total. *See* Dkt. No. 218 at 3–5. Leaving aside the future investment returns, which could be in the hundreds of thousands or even millions of dollars, the value of the assets Mr. von der Goltz is forfeiting exceeds \$3.1 million.

These assets also represent the vast majority of what Mr. von der Goltz had to live on for the remainder of his life. Aside from these assets, Mr. von der Goltz has a bank account in Germany with approximately \$12,000, the right to a portion of carried interest that may be earned on the few remaining investments in certain of the venture capital funds he used to manage, and minority investments in a handful of illiquid overseas assets of uncertain value. At present, he largely depends on his wife to pay his monthly expenses. For example, she previously loaned him \$650,000 in order to secure the bond included in his conditions of pretrial release, of which \$440,000 is slated to be paid toward his forfeiture obligation.

In these circumstances, the factors that guide the Court’s decision regarding a fine weigh overwhelmingly in favor of not imposing an additional fine on Mr. von der Goltz. As relevant here, those factors include (1) the defendant’s income, earning capacity, and financial resources; (2) the burden that the fine will impose upon the defendant; (3) any pecuniary loss inflicted upon

others as a result of the offense; and (4) the need to deprive the defendant of illegally obtained gains from the offense. *See* 18 U.S.C. § 3572(a). Because the timing of any future carried interest distributions is unpredictable, Mr. von der Goltz’s reliable monthly income is limited to Social Security, and at 83 and in poor health, he has no practical ability to return to the workforce. As a result, any fine likely would have to be paid by his wife while he attempts to liquidate the minority investments in private companies held by Revack.

Moreover, the loss inflicted upon the IRS in the form of lost tax revenue—which is equal to Mr. von der Goltz’s illegally obtained gains—will be repaid through restitution. The value of assets that Mr. von der Goltz and codefendant Richard Gaffey have agreed to forfeit should be sufficient to satisfy any restitution order, since the Justice Department’s Money Laundering and Asset Recovery Section, which is a party to this case, has authority to transfer the forfeited funds to the IRS through the restoration process. *See* U.S. Dep’t of Justice, Criminal Division, Money Laundering and Asset Recovery Section, Asset Forfeiture Policy Manual at 183–87 (2019);²² *see also United States v. Feldman*, 939 F.3d 182, 188–91 (2d Cir. 2019) (discussing how forfeited funds may be applied to a defendant’s restitution obligation through restoration).

Contrary to the position taken in the presentence investigation report, discussed below at 49–52, no additional financial penalty is necessary to satisfy the objectives of sentencing.

V. OBJECTIONS TO THE PRESENTENCE INVESTIGATION REPORT

Paragraphs 63 and 64. These paragraphs inaccurately suggest that Mr. von der Goltz improperly sought to obstruct the government’s investigation in connection with certain grand jury subpoenas. While it is true that a contempt order issued against Mr. von der Goltz, the background to the order, which Mr. von der Goltz set out in an earlier filing, reveals the

²² Available at <https://www.justice.gov/criminal-afmls/file/839521/download>.

misleading characterization the presentence investigation report provides to this episode. *See* Dkt. No. 157, at 10–19 & accompanying exhibits. In brief, Mr. von der Goltz invoked his Fifth Amendment act-of-production privilege with respect to certain records maintained at a foreign bank, and when the Court ruled that the privilege did not apply, Mr. von der Goltz both made a request to the foreign bank pursuant to *Doe v. United States*, 487 U.S. 201 (1988), and also sought to appeal the order to compel. In order to take an appeal, however, Mr. von der Goltz first had to be held in contempt, and the government proposed that it would agree to stay any fine imposed pursuant to a contempt order until 10 days after a decision by the Court of Appeals. *See id.* at 11–12; Dkt. No. 157-9, at 2 (Letter from S. Paul to J. Neiman (Apr. 1, 2018)). Notably, the government chose not to oppose Mr. von der Goltz’s motion in limine to exclude this evidence at trial. *See* Dkt. No. 169, at 1 n.1. Given this context, paragraphs 64 and 65 create a misleading impression, and the Court should order that the corrections Mr. von der Goltz proposed to the Probation Office be adopted in the final report. *See* PSR at 37 (Dkt. No. 222).

Paragraph 75. This paragraph incorrectly states that the applicable loss amount is between \$1.5 million and \$3.5 million. The presentence investigation report appears to arrive at this figure based on the government’s position that the value of income taxes evaded as a result of Mr. von der Goltz’s offenses was \$1,411,564 and that the value of expatriation taxes evaded was \$2,037,283.60. Only the \$1.4 million income tax loss should be factored into the Guidelines analysis. The indictment does not charge Mr. von der Goltz with evading the expatriation tax, and any such evasion does not qualify as “relevant conduct” under the Sentencing Guidelines.

The indictment does not charge Mr. von der Goltz with evading expatriation taxes. It charges him with conspiring, between 2000 and 2016, to “evade and defeat a substantial part of income tax.” S6 Indictment, ¶¶ 1–2 (Dkt. No. 149). But it was not until October 2017, after the

charged conspiracy, that Mr. von der Goltz relinquished his green card, the trigger for any expatriation tax. His failure to pay that tax is outside the temporal scope of the charges.

More importantly, the expatriation tax is not an *income* tax. Instead, it imposes a tax based on the accumulated value of all assets (wherever located) of certain expatriating U.S. citizens and long-term residents whose incomes or assets exceed the statutory threshold. 26 U.S.C. § 877A. The tax is calculated by (1) pretending that the expatriate sells all her assets immediately before expatriating and then (2) taxing “the increase in value of assets that continue to be held by an expatriate or former long-term resident of the United States.” Staff of J. Comm. on Tax’n, 104th Cong., Issues Presented by Proposals to Modify the Tax Treatment of Expatriation, at 69 (Comm. Print 1995). Notably, however, the event triggering the tax does not involve any realization of income by the expatriate. And it has long been the law that, for purposes of the Sixteenth Amendment, income taxes on capital can be levied only to the extent of *realized* gains, not merely unrealized appreciation in value. *See, e.g., Helvering v. Horst*, 311 U.S. 112, 115 (1940) (“Admittedly not all economic gain of the taxpayer is taxable income. From the beginning the revenue laws have been interpreted as defining ‘realization’ of income as the taxable event rather than the acquisition of the right to receive it.”); *see also Eisner v. Macomber*, 252 U.S. 189, 207–12 (1920). By imposing a tax on *unrealized* gains, the expatriation tax cannot be an income tax consistent with the Sixteenth Amendment. *See generally* Mark E. Berg, *Bar the Exit (Tax)! Section 877A, the Constitutional Prohibition Against Unapportioned Direct Taxes and the Realization Requirement*, 65 Tax Law 181, 208–15 (2012) (demonstrating that the expatriation tax imposes an unapportioned direct tax, not an income tax under the Sixteenth Amendment). As a result, the government cannot shoehorn any failure to pay the expatriation tax into the charges in the indictment.

Nor is the expatriation tax “relevant conduct” under Section 1B1.3 of the Sentencing Guidelines. As applicable here, “relevant conduct” considered in a Guidelines analysis constitutes “all acts and omissions . . . by the defendant . . . that occurred during the commission of the offense of conviction, in preparation for that offense, or in the course of attempting to avoid detection or responsibility for that offense.” U.S.S.G. § 1B1.3(a)(1). Because any obligation to pay the expatriation tax could not have arisen until late 2017, and the indictment reaches only to 2016, any failure to pay the income tax could not have occurred “during” the commission of the offense. *See United States v. Wernick*, 691 F.3d 108, 115 (2d Cir. 2012) (“To qualify as ‘relevant conduct,’ the conduct must occur in the course of commission of the offense of conviction.”). Nor is there a basis for finding that failing to pay the expatriation tax was part of an attempt to avoid detection. The evidence does not suggest that Mr. von der Goltz understood that failing to declare that he was the beneficiary of the Revack Foundation would have had any impact on the calculation of the expatriation tax. In the months before he relinquished his green card, Mr. von der Goltz, on advice of counsel, transferred a number of assets held in his personal name as gifts to a trust for his children so that he would fall below the expatriation tax threshold. But nongrantor trusts like Revack generally are *excluded* for purposes of calculating the expatriation tax. 26 U.S.C. § 877A(c)(3). To the extent the government can show anything about Mr. von der Goltz’s intent when he failed to pay the expatriation tax, it is that he sought to minimize his tax obligation, not to “avoid detection” of any prior misconduct.

Because the expatriation tax is not charged in the indictment and does not qualify as relevant conduct under Section 1B1.3, it should not be included in determining the relevant loss amount under the Sentencing Guidelines.

Paragraph 130. This paragraph erroneously states that Mr. von der Goltz “declined to

furnish a fair market value” for his personal interests in two investment funds. Not so. In fact, Mr. von der Goltz provided this information to the Probation Office, as requested, on June 15, 2020, noting that “the estimated value of my general partner carried interest in BCV IV and BPEA II” is \$25,000 and \$426,555, respectively. (Letter from H.J. von der Goltz to Officer J. Kim at 2 (Exhibit 15).) These figures represent the estimated fair market value of what Mr. von der Goltz stands to receive over time as these funds are liquidated.

Paragraph 128. This paragraph includes as part of Mr. von der Goltz’s assets a one-third share of an apartment in Munich, Germany, with estimated value of \$300,000. By virtue of the Consent Preliminary Order of Forfeiture, however, this has been forfeited and no longer belongs to Mr. von der Goltz. Dkt. No. 218.

Paragraphs 131, 137–39, and 141, and pages 41–42. These portions of the presentence investigation report inaccurately suggest that Mr. von der Goltz has not been forthcoming about his assets and the Revack Foundation in particular. The criticism appears to derive primarily from Mr. von der Goltz’s failure to provide a fair market valuation for the Revack Foundation. As noted above and reflected in the Consent Preliminary Order of Forfeiture, Mr. von der Goltz has forfeited all the liquid assets of the Revack Foundation (approximately \$2.3 million), as well as all future distributions from the Foundation’s investments in its venture capital and private equity funds. While the value of these distributions is uncertain, they likely will be several hundred thousand dollars and potentially millions. The remaining assets of the Foundation, as reflected in the attachment to the report (which Mr. von der Goltz provided to the Probation Office), consist primarily of minority interests in Rain Forest Adventures; a company called the Centrans Group, which operates a stevedoring business in Guatemala and energy plants in Guatemala and Nicaragua; a hunting club in Sinaloa, Mexico; and other undeveloped real estate.

It does not appear that any other assets owned by Revack have any significant value.

Obtaining an accurate fair market valuation for the assets held by the Revack Foundation would require engaging a valuation specialist, and the estimated cost of that exercise is \$575,000 to \$750,000. (StoneTurn Proposal at 7 (Exhibit 16).) That is prohibitively expensive for Mr. von der Goltz. As discussed above at 42–43, following the forfeiture order, his liquid assets consist of approximately \$12,000 in a bank account in Germany. Even paying the cash component of the forfeiture will require borrowing money from his wife. Retaining a valuation specialist would require Mr. von der Goltz to spend money he simply does not have.

Nor would a professional analysis shed much light on the valuation. Rain Forest Adventures, like many tourism companies, has been devastated by the COVID-19 pandemic, and it is not clear whether it will survive. Similarly, the Mexican hunting club, which already was struggling due to drug cartel violence in the area, will face additional challenges due to COVID-19. And even before the pandemic, the Centrans Group had been affected by political instability in Nicaragua and nonpayment by state-owned clients. As the valuation proposal makes clear, “the tourism and energy industries were among those most affected by the pandemic. It is not possible to predict the true impact the pandemic will have on the global economy, nor the time it will take to recover. This uncertainty will increase the risk profile of [the interests held by Revack] and limit near- to medium-term growth prospects, which we expect to have a negative impact on value.” (StoneTurn Proposal at 5 (Exhibit 16)). While Mr. von der Goltz could have offered an estimated value simply to appease the Probation Office, it would have been little better than a guess.

The presentence investigation report also makes several misguided references to a document from 2012 that stated that the Revack Foundation had a total value of \$35 million.

The document (if it ever was correct) is badly outdated. Notably, the presentence investigation report makes no mention of the fact that a July 2018 analysis estimated the value of the investments at 36% lower than the 2012 estimate. Even worse, the Probation Office ignores that *the government itself*, for purposes of computing Mr. von der Goltz's expatriation tax, estimated that the value of Revack's investments was *at least* 30% lower than what was reflected in internal Revack analyses. The Probation Office's suggestion that the Revack Foundation has \$35 million, or anything close to it, is deeply misleading.

Equally misleading is the report's comment that "we would argue that it is within von der Goltz's control as to whether he receives a monetary distribution from the Revack Foundation." PSR at 41 (Dkt. No. 222). Mr. von der Goltz has disclosed, under penalty of perjury and to the satisfaction of the government, every bank account in his name or in the name of any Revack entity. All of Revack's liquid assets have been forfeited, and what remains in Revack are illiquid assets and minority interests that, even if they retain any value through the COVID-19 pandemic, cannot be converted to cash with the kind of speed necessary to pay an additional financial penalty. The Probation Office's suggestion that Revack has cash available to Mr. von der Goltz is baseless.

Nor is there any basis for the report's insinuation that Mr. von der Goltz has provided an inaccurate picture of his financial position. Notably, the government, which has investigated Mr. von der Goltz for more than four years, consented to a forfeiture order and has not suggested that Mr. von der Goltz has additional undisclosed assets. To the extent the report's insinuation is based on the "household" expenses listed in Paragraph 138, that is misleading. As the Probation Office knows, the vast majority of these expenses are incurred by Mr. von der Goltz's wife, who (like many people in their seventies) has savings, securities, and other assets available to fund

her expenses. There is no mystery about where the money is coming from.

Finally, the report states that Mr. von der Goltz failed to explain “whether he receives or is able to receive any benefits” from the H. Joachim von der Goltz Children’s Trust. PSR ¶ 137 (Dkt. No. 222). Mr. von der Goltz informed the Probation Office on May 20, 2020 that he has never received any disbursements from the Children’s Trust. Nor does the trust indenture permit him to receive any. Under the indenture, the beneficiaries of the trust are Mr. von der Goltz’s three children. (*See* H. Joachim von der Goltz Children’s Trust Indenture, art. 2 (Exhibit 17).) If they and their issue die before the termination of the trust, then Mr. von der Goltz’s wife would become the beneficiary, and if she is no longer living, then his nephews would become the beneficiaries. (*Id.*, art. 4.) The trust is irrevocable (*id.*, art. 15), and there is no provision that would permit Mr. von der Goltz to receive distributions. The Children’s Trust is irrelevant to understanding Mr. von der Goltz’s financial position.

Mr. von der Goltz provided information and documentation as the Probation Office requested and answered more than 30 detailed follow-up questions to the best of his ability. The financial constraints that prevent him from spending \$575,000 to \$750,000 to obtain an estimated valuation of Revack’s remaining assets, and his decision not to provide his own speculation about the value just to appease the Probation Office, are no basis to suggest that Mr. von der Goltz is hiding anything from the Probation Office, the government, or the Court.²³

²³ After receiving the preliminary presentence investigation report, Mr. von der Goltz notified the Probation Office of a number of inaccuracies in the report. *See* PSR at 35–38 (Dkt. No. 222). To the extent not already corrected in the final presentence investigation report, Mr. von der Goltz respectfully renews those objections and requests that the Court order corresponding amendments to the final presentence report, along with those set out above.

CONCLUSION

For the foregoing reasons, the Court should sentence Mr. von der Goltz to time served and a one-year term of supervised release that includes home confinement, to be followed by his immediate voluntary departure from the United States.

Dated: New York, New York
July 2, 2020

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